

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
REPLY BRIEF**



75-7031

ORIGINAL  
WITH PROOF  
OF SERVICE

75-703831

Consolidated with 75-7055 & 75-7057

To be argued by  
LEONARD M. MARKS

---

**UNITED STATES COURT OF APPEALS**

*for the*

**SECOND CIRCUIT**

---

HOWARD BERSCH,

Plaintiff,

-against-

DREXEL FIRESTONE, INC., DREXEL HARRIMAN RIPLEY, BANQUE  
ROTHSCHILD, HILL SAMUEL AND CO., LIMITED, GUINNESS MAHON  
& CO., LIMITED, PIERSON, HELDRING & PIERSON, SMITH, BARNEY  
& CO. INCORPORATED, J. H. CRANG AND CO., INVESTORS OVER-  
SEAS BANK LIMITED,

Defendants,

ARTHUR ANDERSEN & CO., I.O.S., LTD., and BERNARD CORNFELD,  
Defendants-Appellants.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

REPLY BRIEF OF APPELLANT BERNARD CORNFELD

---

GOLD, FARRELL & MARKS

Attorneys for Defendant-Appellant Bernard Cornfeld  
595 Madison Avenue, New York, New York 10022

Of Counsel:

Martin R. Gold

Leonard M. Marks

Charles B. Ortner

(4593)

7

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x

HOWARD BERSCH, :  
Plaintiff-Appellee, :

-against- :  
DREXEL FIRESTONE, INCORPORATED, :  
DREXEL HARRIMAN RIPLEY, BANQUE

ROTHSCHILD, HILL SAMUEL & COMPANY, :  
LIMITED, GUINNESS MAHON & CO.,  
LIMITED, PIERSON, HELDING & PIERSON,  
SMITH BARNEY & CO., INCORPORATED,  
J. H. CRANG & CO., and INVESTORS  
OVERSEAS BANK, LIMITED, :

Defendants, :  
ARTHUR ANDERSEN & CO., I.O.S.,  
LTD., and BERNARD CORNFELD, :

Defendants-Appellants. :  
-----x

REPLY BRIEF OF DEFENDANT-  
APPELLANT BERNARD CORNFELD

Without any support in the record, plaintiff makes the totally false assertions that the Swiss proceedings against Mr. Cornfeld are "unlikely to produce the monetary restitution due class members," and that "this is the only forum in which foreign class members can obtain meaningful redress . . ." (Brief of Plaintiff-Appellee, p. 91).

In fact, plaintiff is the only person who has filed an action in the United States. Moreover, as we discussed in our main brief, 395 IOS purchasers, including at least eighteen Americans, have filed and are litigating claims in Switzerland based upon the same offerings which are the subject of the present action in the District Court (192A-15-78, 34-49). Swiss counsel for these claimants have been paid one Swiss franc per share of stock involved in the proceedings plus a fee of 50,000 Swiss francs for the settlement of 90 claims. (297-A) These 90 claimants have been paid, and negotiations concerning settlement of approximately 200 other claims are presently pending. (Id.)

Plaintiff's assertion that the Swiss claimants are having "difficulty . . . recovering in Switzerland" is made from whole cloth. Before his release from Swiss prison, Mr. Cornfeld was required to post cash bail in the sum of \$1.6 million. This assures that Mr. Cornfeld will return to Switzerland to attempt to resolve all claims (as he has already done), and provides a financial fund if the claimants in Switzerland are successful. If Bersch were truly

interested in resolving his own claim, he would clearly be best advised to file in Switzerland, as 18 other Americans have done, rather than attempt to invoke American class action procedures on behalf of 100,000 persons resident all over the world.

Plaintiff also contends that an attorney representing some claimants in the Swiss proceedings decided not to intervene in this action because plaintiff's counsel had informed him that the claimants in Switzerland were already included as members of plaintiff's class in accordance with Judge Frankel's decision dated June 28, 1972 \*. (Brief of Plaintiff-Appellee, pp. 5-6, 91.) But this is precisely the heart of the problem facing Cornfeld. He is being forced to defend the same claims, by the same claimants, in two different jurisdictions. His difficulties are compounded by the absence of res judicata effect

---

\* Plaintiff conveniently overlooks the fact that his papers in support of a class action determination grossly misrepresented the nature and extent of the Swiss proceedings. Cornfeld, the only defendant who was apparently aware of these proceedings, had not even been served by plaintiff until long after Judge Frankel had rendered his tentative class action decision.

abroad of any judgment which the American court may render in a class action proceeding -- a classic case of one-way intervention prohibited by Rule 23.

Equally significant is plaintiff's failure to answer the arguments raised as to the absence of subject matter jurisdiction with regard to claims of individual foreign purchasers. He rather argues that since various administrative matters relating to the offerings occurred here, the court has jurisdiction. He ignores the discussion contained in our main brief (pp. 17-18) that the following controlling factors all had a foreign situs with respect to foreign purchasers of IOS stock:

- (a) the place where the representations were made by the defendants;
- (b) the place where representations were received;
- (c) the place where purchasers relied on the representations;
- (d) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
- (e) the place where foreign purchasers and where IOS tendered performance.

Plaintiff continues to refuse to deal with the fact that, from the standpoint of the tens of thousands of foreign purchasers whom he claims to represent, their transactions had no contact of any kind with the United States, they never expected that American securities laws would govern, and many are pursuing their claims in Switzerland, the headquarters of IOS.

Plaintiff also misconceives the principles established by Zahn v. International Paper Co., 414 U.S. 291 (1973) and Snyder v. Harris, 394 U.S. 332 (1969). Those cases require that in a class action, each class member must meet the relevant subject matter jurisdiction predicates to pursue his claim as a part of the class. If the basis of the exercise of power is diversity of citizenship, each class member's claim must meet the jurisdictional amount requirement; if the basis of jurisdiction is a federal question, each class member must have, individually, a claim cognizable under the relevant federal statute.

Under plaintiff's construction of Zahn and Snyder, a foreign class member who would not be able to assert a claim under §10-b in his own right may

nevertheless have it asserted on his behalf by an American resident here who can invoke subject matter jurisdiction.

Zahn and Snyder make clear that Rule 23 does not permit those who have justiciable federal claims to bootstrap into federal court claims of those who are otherwise not properly here.

CONCLUSION

The order sustaining subject matter jurisdiction should be reversed, and the complaint should be dismissed.

Dated: New York, New York  
February 27, 1975

Respectfully submitted,

GOLD, FARRELL & MARKS  
Attorneys for Defendant-  
Appellant Bernard Cornfeld

Of Counsel:

Martin R. Gold  
Leonard M. Marks  
Charles B. Ortner

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x

HOWARD BERSCH,	:	
	Plaintiff-Appellee,	Docket Nos.
	v.	75-7038
		75-7055
DREXEL FIRESTONE, INCORPORATED, et al.,	:	75-7057
	Defendants,	<u>ERRATA SHEET</u>
		:
ARTHUR ANDERSEN & CO., I.O.S., LTD. and BERNARD CORNFELD,	:	
	Defendants-Appellants.	:

-----x

Plaintiff-Appellee wishes to call to the Court's attention the fact that pages 8 and 9 in his Petition for Rehearing were inadvertently transposed. Accordingly, plaintiff-appellee respectfully requests that the Court read page 8 as page 9 and page 9 as page 8.

Dated: New York, N.Y.  
May 13, 1975

Very respectfully yours,

SILVERMAN & HARNES

By Sidney J. Silverman  
Member of the Firm  
Attorneys for Plaintiff-Appellee  
75 Rockefeller Plaza  
New York, New York 10019

TO: SULLIVAN & CROMWELL  
Attorneys for Defendants Drexel Firestone, Inc., et al.  
48 Wall Street  
New York, New York

DAVIS POLK & WARDWELL  
Attorneys for defendants Banque Rothschild, et al.  
One Chase Manhattan Plaza  
New York, New York

WILLKIE FARR & GALLAGHER  
Attorneys for Defendant J. H. Crang  
One Chase Manhattan Plaza  
New York, New York

BREED ABBOTT & MORGAN  
Attorneys for Defendant Arthur Andersen & Co.  
One Chase Manhattan Plaza  
New York, New York

PAUL WEISS RIFKIND WHARTON & GARRISON  
Attorneys for Defendant Overseas Bank, Ltd.  
345 Park Avenue  
New York, New York

GOLD, FARRELL & MARKS  
Attorneys for Defendant Bernard Cornfeld  
595 Madison Avenue  
New York, New York

WACHTELL LIPTON ROSEN & KATZ  
Attorneys for Defendant I.O.S., Ltd.  
299 Park Avenue  
New York, New York

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

SIMONE C. ANDRE, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 333 East 53rd Street, New York, New York 10022

That on the 13th day of May 1975, deponent served the within Errata Sheet upon the attorney's listed below in this action at the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States postal service within the State of New York.

SULLIVAN & CROMWELL  
Attorneys for Defendants  
Drexel Firestone, Inc., et al.  
48 Wall Street  
New York, New York

DAVIS POLK & WARDWELL  
Attorneys for Defendants  
Banque Rothschild, et al.  
One Chase Manhattan Plaza  
New York, New York 10005

WACHTEL LIPTON ROSEN & KATZ  
Attorneys for Defendant  
I.O.S., Ltd.  
299 Park Avenue  
New York, New York

WILLKIE FARR & GALLAGHER  
Attorneys for Defendant  
J. H. Crang & Co.  
One Chase Manhattan Plaza  
New York, New York

BREED, ABBOT & MORGAN  
Attorneys for Defendant  
Arthur Andersen & Co.  
One Chase Manhattan Plaza  
New York, New York

PAUL WEISS RIFKIND WHARTON & GARRISON  
Attorneys for Defendant  
Overseas Bank, Ltd.  
345 Park Avenue  
New York, New York

GOLD, FARRELL & MARKS  
Attorneys for Defendant  
Bernard Cornfield  
595 Madison Avenue  
New York, New York

*Simone C. Andre'*  
\_\_\_\_\_  
Simone C. Andre

Sworn to before me  
this 13th day of May, 1975

Rosalie A. McGovern  
Notary Public

ROSLIE A. McGOVERN  
NOTARY PUBLIC, State of New York  
No. 24-070610b  
Qualified in Kings County  
Certificate 1064 in New York County  
Commission Expires March 30, 1977

NOTICE OF ENTRY

Sir:- Please take notice that the within is a (certified) true copy of a  
duly entered in the office of the clerk of the within  
named court on 19

Dated,

Yours, etc.,

**SILVERMAN & HARNES**

Attorneys for

Office and Post Office Address  
75 ROCKEFELLER PLAZA  
BOROUGH OF MANHATTAN NEW YORK, N.Y. 10019

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:- Please take notice that an order

of which the within is a true copy will be presented  
for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19  
at M.

Dated,

Yours, etc.,

**SILVERMAN & HARNES**

Attorneys for

Office and Post Office Address  
75 ROCKEFELLER PLAZA  
BOROUGH OF MANHATTAN NEW YORK, N.Y. 10019

To

Attorney(s) for

Index No. 75-7038 75-7055 Year 19

75-7057

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

HOWARD BERSCH,

Plaintiff-Appellee,

v.

DREXEL FIRESTONE, INC., et al.,

Defendants,

ARTHUR ANDERSEN & CO., I.O.S.,  
LTD., and BERNARD CORNFELD,

Defendants-Appellant

ERRATA SHEET

**SILVERMAN & HARNES**

Attorneys for Plaintiff-Appellee  
Office and Post Office Address, Telephone  
75 ROCKEFELLER PLAZA  
BOROUGH OF MANHATTAN NEW YORK, N.Y. 10019  
(212) 765-7884

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for



Received 3 copies of the within  
Reply Brief of Appellants Cornfield  
this 3 day of March, 1975.

Sign Leuman & Harvey M. Green  
For: Schuman & Harvey Esq(s).  
Att'ys for Plaintiff

Received 3 copies of the within  
Reply Brief of Appellants Cornfield  
this 3 day of March, 1975.

3-3-1975  
Sign WEISS, RIFKIND, WHARTON & GARRISON  
By Paul Weiss, Rifkind, Wharton & Garrison  
For: Garrison Esq(s).

Att'ys for Defendant Investors  
Business Bank Ltd.

Received 3 copies of the within  
Reply Brief of Appellants Cornfield  
this 3 day of March, 1975.

Sign John P. Middleton  
Wachtell Lipton Rosen & Katz  
For: Esq(s).

Att'ys for Defendant Appellants  
D.S. Esq.

Received 3 copies of the within  
Reply Brief of Appellants Cornfield  
this 3 day of March, 1975.

Sign Ed Schlesinger  
Sullivan & Cromwell  
For: Rep. of Preston Esq(s).

Att'ys for Defendants  
Firestone Inc. Pierson & Selby  
Pierson, Pierson, Nalow & Co. Ltd.  
Will Samuel & Co. Ltd.

Received 3 copies of the within  
Reply Brief of Appellants Cornfield  
this 3 day of March, 1975.

Sign Alfred Mayer  
Davis Polk & Wardwell  
For: Esq(s).

Att'ys for Defendants  
Barney & Co. Inc. v. Baugue  
Particulars

Received 3 copies of the within  
Reply Brief of Appellants Cornfield  
this 3 day of March, 1975.

Sign Breed Abbott & Morgan  
Breed Abbott & Morgan  
For: Esq(s).

Att'ys for Def Appellants  
Arthur  
Anderson & Co.

Received 3 copies of the within  
Reply Brief of Appellants Cornfield  
this 3 day of March, 1975.

Sign William T. Gallagher  
Wellhite & Gallagher  
For: Esq(s).

Att'ys for Defendant W.J. Coey & Co.



